88-2051

No. _____

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

October Term, 1988

LONGVIEW FIBRE COMPANY,

Petitioner,

vs.

JEANNETTE PAPER COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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Question Presented

Does an award of $500,000.00 in punitive damages for an alleged economic tort violate the defendant's rights under the United States Constitution?[1]

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[1] A similar, but not identical, question is under advisement by this Court in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, No. 88-556, *cert. granted* Dec. 5, 1988. This Court heard argument in *Browning-Ferris* on April 15, 1989.

List of Parties

The only parties to this proceeding are those listed in the caption.

TABLE OF CONTENTS.

	Page
Question Presented	i
List of Parties	ii
Table of Authorities	v
Opinions of the Court Below	1
Jurisdictional Statement	3
Constitutional Provisions Involved	4
Statement of the Case	5
Reasons for Allowance of the Writ	7
I. The Award Of Punitive Damages Against Petitioner Violates The Fourteenth Amendment Because It Was Imposed By The Jury Pursuant To A Standard That Is Unconstitutionally Vague	7
II. The Award Of Punitive Damages Against Petitioner Violates The Fourteenth Amendment Because It Was Imposed By The Jury Pursuant To The "Preponderance Of The Evidence" Standard Of Proof	10
III. The Substantial Amount Of Punitive Damages Awarded Against Petitioner Violates The Excessive Fines Clause Of The Eighth Amendment And The Fundamental Fairness Doctrine Of The Fourteenth Amendment	11
Conclusion	13

Page

Appendix:

Order of the Supreme Court of Pennsylvania Dated May 8, 1989 ..... 1a
Order of the Supreme Court of Pennsylvania Dated March 20, 1989..... 2a
Order and Opinion of the Superior Court of Pennsylvania Dated September 26, 1988 ..... 3a
Opinion and Order of Court of Common Pleas of Allegheny County, Pennsylvania Dated September 30, 1987 ..... 22a

Page

TABLE OF AUTHORITIES.

Cases:

Addington v. Texas, 441 U.S. 418 (1979) 11
Ashton v. Kentucky, 384 U.S. 195 (1966)..... 9
Bankers Life & Casualty Co. v. Crenshaw, 108 S.Ct. 1645 (1988) 7,9
Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., No. 88-556, *cert. granted* Dec. 5, 1988 6,11
Coates v. City of Cincinnati, 402 U.S. 611 (1971) 9
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)... 8,9
Giaccio v. Pennsylvania, 382 U.S. 399 (1966) 8,9
In re Winship, 397 U.S. 358 (1970) 10
Lassiter v. Dep't of Social Services, 452 U.S. 18 (1981) 12
Papachristou v. City of Jacksonville, 405 U.S. 156 (1982) 9
Santosky v. Kramer, 455 U.S. 745 (1982) 11
Solem v. Helm, 463 U.S. 277 (1983)..... 12

Constitution:

United States Constitution:
Amendment VIII 4,11,12,13
Amendment XIV, Section 1 4,7,9,10,11,12,13

Other Authorities:

Jeffries, *A Comment on the Constitutionality of Punitive Damages,* 72 Va.L.Rev. 139 (1986)..... 12

IN THE

Supreme Court of the United States

October Term, 1988

No. _____

LONGVIEW FIBRE COMPANY,

Petitioner,

vs.

JEANNETTE PAPER COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

Longview Fibre Company ("Longview") respectfully petitions for a writ of certiorari to review the judgment of the Superior Court of Pennsylvania in this case.

Opinions of the Court Below

The Order of the Pennsylvania Supreme Court dated May 8, 1989, denying Petitioner's Petition for Reconsideration, is unreported and is reproduced in the Appendix. A. 1a. The Order of the Pennsylvania Supreme Court dated March 20, 1989, denying Petitioner's Petition for Allowance of Appeal, is unreported and is reproduced in the Appendix. A. 2a.

The Opinion and Order of the Superior Court of Pennsylvania dated September 26, 1988 are reported at 378 Pa. Super. 148, 548 A.2d 319 and are reproduced in the Appendix. A. 3a-21a.

The Opinion and Order of the Court of Common Pleas of Allegheny County, Pennsylvania dated September 30, 1987, denying Petitioner's post-trial motions are unreported and are reproduced in the Appendix. A. 22a-29a.

Jurisdictional Statement

The Order of the Supreme Court of Pennsylvania denying Petitioner's Petition for Reconsideration is dated May 9, 1989.

This Honorable Court has jurisdiction by writ of certiorari pursuant to 28 U.S.C. §1257(3).

Constitutional Provisions Involved

This case involves the following provisions of the Constitution of the United States:

Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Amendment XIV, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Longview Fibre Company, a manufacturer of paper and paper products based in the State of Washington, seeks certiorari to review a judgment of the Pennsylvania Superior Court affirming an award of punitive damages against Longview in connection with a claim for alleged interference with contractual relations.

The action arises out of a dispute between Jeannette Paper Company, a paper broker located in the Pittsburgh area, and Longview concerning whether an oral brokerage contract was entered into during a single telephone call in the Fall of 1983. Jeannette claimed at trial that Longview entered into an exclusive brokerage contract during the telephone call under which Longview obligated itself to use Jeannette as a broker with respect to any sales by Longview of interleaving paper, a specialty grade of paper used in the steel industry. Jeannette contended that sales of interleaving paper by Longview to Allegheny Ludlum Steel Corporation after the call were in breach of the alleged contract and that such sales also interfered with an alleged prospective business relationship between Jeannette and Allegheny Ludlum.

At trial, the Honorable Frederic G. Weir of the Court of Common Pleas of Allegheny County, Pennsylvania submitted the case to the jury and, over Longview's objection, instructed the jury that it could award punitive damages against Longview. The jury returned a verdict against Longview in the amount of $244,000.00 in compensatory damages and $500,000.00 in punitive damages, for a total verdict of $744,000.00. Longview's post-trial motions were denied, A. 22a-29a, and on

October 7, 1987 the trial court entered judgment against Longview in the amount of $762,227.17, reflecting the verdict amount plus prejudgment interest.

Longview appealed to the Pennsylvania Superior Court, which affirmed the judgment of the trial court by Order and Opinion dated September 26, 1988. A. 3a-21a. Longview filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania, requesting that the Pennsylvania Supreme Court assume discretionary jurisdiction. The Petition was denied on March 20, 1989. A. 2a. Longview filed a Petition for Reconsideration with the Pennsylvania Supreme Court, relying in part on this Court's grant of certiorari in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, No. 88-556, *cert. granted* Dec. 5, 1988, and asserting that the award violates the United States Constitution. The Pennsylvania Supreme Court denied Longview's Petition for Reconsideration on May 8, 1989. A. 1a.

REASONS FOR ALLOWANCE OF THE WRIT

Certiorari should be granted to review whether the award of punitive damages violates the United States Constitution.

I. The Award Of Punitive Damages Against Petitioner Violates The Fourteenth Amendment Because It Was Imposed By The Jury Pursuant To A Standard That Is Unconstitutionally Vague.

In her concurring opinion in *Bankers Life & Casualty Co. v. Crenshaw,* 108 S.Ct. 1645 (1988), Justice O'Connor wrote:

> As the Mississippi Supreme Court said, "the determination of the amount of punitive damages is a matter committed solely to the authority and discretion of the jury." . . . This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process. The Court has recognized that "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequence of violating a given criminal statute."

Id. at 1656. Justice Scalia joined in this concurrence.

As in Mississippi, the standards by which juries in Pennsylvania are permitted to award punitive damages are exceedingly vague and indefinite. The standard of "outrageousness"[2] utilized by the trial court pursuant to

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[2] The trial court's charge to the jury concerning the determination of whether or not to award punitive damages was as follows:

> [I]f you find that the conduct of the Defendant was outrageous, you may award punitive damages as well as any compensatory damages in order to punish the Defendant for its conduct and to deter the Defendant and others from the commission of like acts.
>
> A party's conduct is outrageous when it acts with a bad motive or reckless indifference to the interest of others.

Pennsylvania law is constitutionally defective in that it fails to meet the constitutional requirements that a law be sufficiently definite as to apprise the public of prohibited conduct and to supply the judge and jury with limits concerning its application. As this Court stated in *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966),

> It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is not in each particular case.

Id. at 402-03. Given the virtually meaningless jury instructions in this case concerning punitive damages, it is not surprising that the jury, after having determined that Longview's conduct was tortious, proceeded to make a substantial award of punitive damages as well.

In addition to the lack of definite standards for determining whether punitive damages ought to be imposed, the standard for awarding punitive damages was unconstitutionally vague in this case because of the absence of any meaningful restrictions on the jury's authority to determine the severity of the punishment. This unfettered discretion also violates due process. *Giacco*, 382 U.S. at 403 (statute that places no conditions upon jurors' power to impose costs is unconstitutional); *see Gertz v. Robert Welch, Inc.*, 418

U.S. 323, 350 (1974) ("In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.").

As suggested by Justices O'Connor and Scalia in *Bankers' Life*, awards of punitive damages by juries invested with virtually standardless discretion are unconstitutional under the doctrine of void-for-vagueness, which condemns excessive indefiniteness in legal standards as violative of due process. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1982); *Coates v. City of Cincinnati*, 402 U.S. 611, 613-15 (1971). Application of the doctrine is not limited to criminal statutes. *See Ashton v. Kentucky*, 384 U.S. 195, 200 (1966) ("[v]ague laws in any area suffer a constitutional infirmity"); *Giaccio*, 382 U.S. at 402 (state statute, whether or not it was labelled "penal," "must meet the challenge that it is unconstitutionally vague").

Accordingly, Petitioner requests that certiorari be granted to review whether the award of punitive damages was imposed pursuant to an unconstitutionally vague standard, in violation of the Due Process Clause of the Fourteenth Amendment.

II. The Award Of Punitive Damages Against Petitioner Violates The Fourteenth Amendment Because It Was Imposed By The Jury Pursuant To The "Preponderance Of The Evidence" Standard Of Proof.

In Pennsylvania, as in many other jurisdictions, punitive damages may be imposed based on a mere "preponderance of the evidence." Such a practice violates the Due Process Clause of the Fourteenth Amendment.

In *In re Winship*, 397 U.S. 358 (1970), this Court held that the Due Process requires that criminal liability be proved "beyond a reasonable doubt." This Court's analysis[3]—requiring that punitive liability inflicted by society be based on a standard more demanding than mere "preponderance of the evidence" because of the risk of an erroneous verdict—is fully applicable to awards of punitive damages. The principle of *Winship* is that in situations involving the potential of punishment by the state (as opposed to compensation for loss), errors are strongly disfavored and a higher standard than "preponderance of the evidence" is constitutionally required.

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[3] Justice Harlan stated as follows in his concurrence:

> [T]he reason for different standards of proof in civil as opposed to criminal litigation [is] apparent. In a civil suit between two private parties for money damages, for example, we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor. A preponderance of the evidence standard therefore seems particularly appropriate for . . . it simply requires a trier of fact "to believe that the existence of a fact is more probable than its nonexistence . . . ."
>
> In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty . . . .

Id. at 371-72.

In other cases outside the criminal law, this Court has required a more stringent standard of proof. *See, e.g., Santosky v. Kramer,* 455 U.S. 745 (1982) ("clear and convincing" standard is applicable in actions for termination of parental rights); *Addington v. Texas,* 441 U.S. 418 (1979) ("clear and convincing" standard is applicable to involuntary commitment proceedings).

Petitioner therefore requests that certiorari be granted to review the question whether the punitive damages award violates the Fourteenth Amendment because it was imposed pursuant to a "preponderance of the evidence" standard.

III. The Substantial Amount Of Punitive Damages Awarded Against Petitioner Violates The Excessive Fines Clause Of The Eighth Amendment And The Fundamental Fairness Doctrine Of The Fourteenth Amendment.

An issue presented to this Court in *Browning-Ferris* is whether the award of punitive damages in that case violates the Excessive Fines Clause of the Eighth Amendment. For the reasons presented to this Court in *Browning-Ferris,* which will not be repeated here, Petitioner contends that the Excessive Fines Clause is applicable to punitive damages and that the award in this case is excessive. Petitioner requests, at a minimum, that if this Court holds in *Browning-Ferris* that the Excessive Fines Clause is applicable to punitive damages, that the judgment in this case be vacated and that the case be remanded for consideration of the propriety of the award.

In addition, the substantial award of punitive damages in this case is grossly disproportionate to the conduct of Petitioner and violates the requirement of "fundamental fairness" that is embodied in the Fourteenth Amendment. *Lassiter v. Dep't of Social Services,* 452 U.S. 18, 24-25 (1981). Fundamental fairness "condemns excessive monetary penalties, whether civil or criminal." Jeffries, *A Comment on the Constitutionality of Punitive Damages,* 72 Va.L.Rev. 139, 154 (1986). As Professor Jeffries illustrates, the basic tenet of due process which requires that fines not be excessive stretches back to the Magna Carta and is well-founded in Anglo-American jurisprudence. *Id.* at 154-57. *See also Solem v. Helm,* 463 U.S. 277, 284-86 (1983) (tracing the prohibition on excessive punishments back to the English principle of "proportionality").

Petitioner therefore requests that certiorari be granted to review whether the award of punitive damages is excessive under the Excessive Fines Clause of the Eighth Amendment and under the Fourteenth Amendment.

Conclusion

The award of punitive damages against Petitioner violates the Eighth and Fourteenth Amendments of the United States Constitution. Certiorari should be granted to review the important and recurring issues presented by this Petition.

Respectfully submitted,

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(412) 288-3010
Counsel for Petitioner
Longview Fibre Company

APPENDIX

Order of the Supreme Court of Pennsylvania Dated May 8, 1989

(Seal)

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

PROTHONOTARY
IRMA T. GARDNER
DEPUTY PROTHONOTARY

801 City-County Building
Pittsburgh, Pa.
15219
(412) 565-2816

May 9, 1989

Michael J. Betts, Esquire
REED SMITH SHAW & McCLAY
Mellon Square, 435 Sixth Avenue
Pittsburgh, PA 15219

In Re: Jeannette Paper Company, etc. v. Longview Fibre Company No. 572 W.D. Allocatur Docket 1988

Dear Mr. Betts:

The Court has entered the following Order on your Application for Reconsideration in the above-captioned matter:

"May 8, 1989
Petition Denied
Per Curiam"

Very truly yours,

IRMA T. GARDNER
Deputy Prothonotary

ITG:cs
cc: Charles P. Falk, Esquire
Hon. Frederic G. Weir

Order of the Supreme Court of Pennsylvania Dated March 20, 1989

(Seal)

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

PROTHONOTARY
IRMA T. GARDNER
DEPUTY PROTHONOTARY

801 City-County Building
Pittsburgh, Pa.
15219
(412) 565-2816

March 20, 1989

Michael J. Betts, Esquire
REED SMITH SHAW & McCLAY
Mellon Square, 435 Sixth Avenue
Pittsburgh, PA 15219

In Re: Jeannette Paper Company, etc. v. Longview Fibre Company No. 572 W.D. Allocatur Docket 1988

Dear Mr. Betts:

The Court has entered the following Order on your Petition for Allowance of Appeal in the above-captioned matter:

"March 20, 1989
Petition Denied
Per Curiam"

Very truly yours,

IRMA T. GARDNER
Deputy Prothonotary

ITG:cs
cc: Charles P. Falk, Esquire
Hon. Frederic G. Weir

Order and Opinion of the Superior Court of Pennsylvania Dated September 26, 1988

SUPERIOR COURT OF PENNSYLVANIA

PITTSBURGH DISTRICT

No. 1509 Pittsburgh, 1987

JEANNETTE PAPER COMPANY,

v.

LONGVIEW FIBRE COMPANY,

Appellant.

ORDER

AND NOW, this 26th day of September, 1988, it is ordered as follows:

_____ Order affirmed.

_____ Order reversed.

__x__ Judgment affirmed.

_____ Judgment of Sentence affirmed.

_____ Judgment of Sentence reversed.

_____ Order vacated and lower court directed to proceed in accordance with opinion filed herewith.

_____ Order modified as set forth in opinion filed herewith.

_____ Costs to be taxed as provided by Chapter 27 of the Pa.R.A.P.

_____ Costs to be taxed as provided in opinion filed herewith.

_____ Appeal quashed.

BY THE COURT

ELEANOR R. VALECKO

Deputy Prothonotary

IN THE SUPERIOR COURT
OF PENNSYLVANIA

No. 01509 Pittsburgh, 1987

JEANNETTE PAPER COMPANY,

Appellee,

vs.

LONGVIEW FIBRE COMPANY,

Appellant.

Appeal from the Judgment Entered October 7, 1987, in the Court of Common Pleas of Allegheny County, Civil Division, at No. GD 84-20975.

Before: ROWLEY, DEL SOLE, and MONTGOMERY, *JJ.*

OPINION BY MONTGOMERY, *J.*:
FILED: SEPTEMBER 26, 1988

This appeal arises from a judgment entered after a jury verdict which awarded the Plaintiff-Appellee, Jeannette Paper Company, the sum of $244,000.00 in compensatory damages and $500,000.00 in punitive damages, against the Defendant-Appellant, Longview Fibre Company. This verdict was based upon claims of breach of contract and tortious interference with contractual relations asserted by Jeannette against Longview. Numerous arguments are raised on this appeal by Longview.

Longview contends, on several grounds, that the trial court erred in not granting it judgment notwithstanding the verdict. Further, the Appellant maintains that the trial court committed reversible error in refusing to grant it a new trial. It is well-established that on an appeal from the refusal of the trial court to enter judgment for the appellant *non obstante veredicto,* the sole duty of the appellate court is to decide whether there was sufficient competent evidence to sustain the verdict, granting the verdict winner the benefit of every favorable inference reasonably to be drawn from the evidence. *Mike v. Borough of Aliquippa,* 279 Pa. Super. 382, 421 A.2d 251 (1980). A judgment notwithstanding the verdict may be entered only in a clear case. *Sperrazza v. Cambridge Mutual Fire Insurance Company,* 313 Pa. Super. 60, 459 A.2d 409 (1983). Further, a judgment n.o.v. should not be entered in cases where evidence is conflicting upon a material fact, *Burg v. Aberman,* 183 Pa. Super. 1, 128 A.2d 179 (1957), and is proper only in circumstances where the facts are such that no two reasonable persons would fail to agree that the verdict was improper. *Buck v. Scott Township,* 325 Pa. Super. 148, 472 A.2d 691 (1984). The appellate court, in considering a motion for judgment n.o.v., is required to consider the evidence, together with all reasonable inferences therefrom, in the light most favorable to the verdict winner. *Claytor v. Durham,* 273 Pa. Super. 571, 417 A.2d 1196 (1980). In such a review, all testimony and inferences unfavorable to the verdict winner must be rejected. *Smith v. Kravitz,* 173 Pa. Super. 11, 93 A.2d 889 (1953). With regard to an appeal challenging the grant or refusal of a new trial, the appellate court will not reverse the trial court's action in the absence of an abuse of discretion or an error of law which controlled the outcome of the case. *Allison v. Snelling & Snelling, Inc.,* 425 Pa. 519, 229 A.2d 861 (1967). Mindful of such standards, we must review the pertinent facts established by the record in this case.

The record establishes that as of 1983, Plaintiff Jeannette Paper Company had been a broker of various types of industrial paper, for over 30 years. The principal product it brokered was a particular type of paper known as interleaving paper. Jeannette's most significant customer for such paper, for approximately 20 years, had been Allegheny Ludlum Steel Corporation. Allegheny Ludlum, a stainless steel producer headquartered in Pittsburgh, Pennsylvania, maintained a facility at West Leechburg, Pennsylvania, which used the interleaving paper to protect stainless steel coils from abrasion. Over the years prior to 1983, Allegheny Ludlum had secured so-called "southern" interleaving paper for use at that facility by purchases through Jeannette, which acted as the broker for several different manufacturers of that type of paper.

None of the paper manufacturers who supplied such a product to Allegheny Ludlum through Jeannette had any written brokerage contracts with Jeannette, and none had ever attempted to sell directly to Allegheny Ludlum. Each had paid Jeannette a 5% commission on sales to Allegheny Ludlum, and Jeannette presented evidence that a 5% commission was the standard in the industry for such brokerage arrangements for such products. At the time of the matters complained of in this action, Jeannette was the broker for the manufacturers providing all of the interleaving paper purchased by Allegheny Ludlum.

Allegheny Ludlum had not expressed dissatisfaction with the services provided by Jeannette, but had problems with the southern interleaving paper produced by one of the manufacturers for which Jeannette was serving as a broker. Accordingly, Jeannette deemed it appropriate to begin to search for another supplier of such interleaving paper.

On October 13, 1983, Norman Berger, the President of Jeannette, wrote to the Defendant-Appellant, Longview Fibre Company, to inquire about Longview's interest in producing this type of interleaving paper, and identified Jeannette as a broker in the sales of such a product to customers in the stainless steel and aluminum industries. In the letter, which was addressed to R.P. Wollenberg, President of Longview, Berger detailed Jeannette's long experience as a broker for such interleaving paper. By letter dated April 18, 1983, Longview advised Jeannette that Longview's Vice-President of Paper Sales, Donald C. Stibich, would be in touch with Jeannette in due course in response to its October 13, 1983 letter.

Later in October, 1983, Stibich telephoned Jeannette and spoke with Mr. Berger. During that telephone conversation, Stibich expressed an interest in producing and marketing the interleaving paper. Berger asked whether Longview would be agreeable to using it as a broker in order to market the product. Stibich confirmed that Longview had marketed its products through brokers in the past and said that employment of Jeannette as a broker would depend on what Jeannette could "bring to the party." In response, Berger told Stibich that Jeannette could provide numerous services and benefits to Longview in such a brokerage arrangement. Among the advantages expressed by Berger included Jeannette's extensive experience in the supply of such paper to the stainless steel industries, Jeannette's extensive knowledge of the requirements and specifications of the paper required by that industry, its awareness of industry customers, their personnel and procedures, Jeannette's ability to respond to and resolve complaints raised by customers, without the need for intercession by the manufacturer or its technical staff,

Jeannette's unlimited line of credit and ability to discount suppliers' bills, and Jeannette's willingness to pay Longview's bill when the interleaving product would be shipped, regardless of the time when the product was received or paid for by the customer.

At the conclusion of this recitation of benefits which Jeannette could provide, Stibich, according to testimony by Berger, responded, "It's very impressive. What you offer is impressive, and I would say we have a fit." Berger then stated that he was pleased that there was a "fit", and that there was a "deal" between the parties. He then advised Stibich that the first account that would be approached, which was the largest, and the one he thought they could sell Longview interleaving paper to first, would be Allegheny Ludlum. He then turned the telephone over to Peter Neft, the Vice-President of Jeannette. Neft supplied Stibich with detailed information concerning interleaving in general, Allegheny Ludlum's particular requirements for this product, names of competitors, pricing information, and more about Jeannette's functions as a broker. They specifically discussed Jeannette acting as a broker for interleaving paper for Allegheny Ludlum, which would be produced by Longview. At the conclusion of the discussion, Stibich expressed that the matters related by Neft sounded good, and arrangements were made for Neft to send samples of the paper, specification sheets, and other information to Longview. After the conversation, Neft sent the samples and information which had been discussed between the parties.

Both Berger and Neft testified that during their telephone discussion with Stibich, they repeatedly referred to Jeannette's commission rate of 5%. Further, in Neft's discussion concerning the price of the paper, he stated that it was a specific dollar amount, less the 5% commission.

After the telephone discussion between Jeannette and Longview, and the transmittal by Jeannette of samples and detailed information concerning the interleaving paper currently being purchased and accepted by Allegheny Ludlum, Longview conducted a credit investigation of Jeannette. Thereafter, it opened a line of credit for Jeannette in its records. Internal Longview documents referenced Jeannette as an established credit customer. By letter dated November 22, 1983, Stibich advised Jeannette that Longview's east coast sales representative, Bruce Boyer, would be in communication with Jeannette. However, Boyer failed to communicate with Jeannette, and Jeannette thereafter made several unsuccessful attempts to reach Boyer by telephone, at the number provided by Stibich. The telephone number was not correct. After its attempts to reach him by telephone failed, Jeannette sent a letter dated December 6, 1983, asking Boyer to call Jeannette.

Prior to receiving any response from Boyer, however, it was discovered by Jeannette that Longview had contacted Allegheny Ludlum directly and obtained an order for interleaving paper of the type which Jeannette had discussed with Longview. Immediately upon learning this information, Berger called Stibich about the information. Stibich denied having any knowledge of Mr. Boyer having taken any order from Allegheny Ludlum. Stibich claimed, in any event, that Jeannette had not advised Longview that Allegheny Ludlum was a potential customer for the product, but rather, he asserted that Longview had become aware of Allegheny Ludlum through other sources. In fact, Stibich asserted that Jeannette had never even mentioned Allegheny Ludlum as a customer of Jeannette before that time.

The record shows that an order, dated December 5, 1983, was placed by Allegheny Ludlum directly with Longview, for 44,000 pounds of interleaving paper for delivery to Allegheny Ludlum's West Leechburg plant. The price for the paper was $550.00 per ton, essentially the same price which had been discussed by Berger in his conversation with Stibich in October, 1983. This represented Longview's first sale of interleaving paper to any customer, at any location, within Longview's 57 year history as a paper manufacturer. It is noteworthy that Boyer, the sales representative for Longview who obtained the order from Allegheny Ludlum, had served in a sales capacity with Longview since 1971. Since that initial order, Longview continued to supply the same plant with the same type of interleaving paper, in significant quantities, on a monthly basis. It was anticipated that sales would continue at the same level, if not increase, in the future. As of the time of the trial, Longview's interleaving sales totaled $4,880,810.00, strictly limited to Allegheny Ludlum. Since the date of the beginning of sales by Longview directly to Allegheny Ludlum, Jeannette suffered a significant drop in the volume of interleaving paper sold to Allegheny Ludlum for use at its West Leechburg plant. It appears that none of the particular type of interleaving paper sold to Allegheny Ludlum by Longview is being sold by Jeannette through a brokerage arrangement with any other supplier. The particular southern paper being manufactured and sold by Longview to Allegheny Ludlum is consistent with the samples and specifications which were provided to Longview by Jeannette in October, 1983.

The record shows evidence of attempts by Longview to eliminate or change evidence relating to the existence of an agreement with Jeannette for the brokerage of interleaving paper. After Longview's San Francisco

office had opened the line of credit for Jeannette, recognizing it as a Longview customer, and sent information to Boyer regarding this, Boyer returned the information with instructions to not publish any reference to Jeannette Paper. Stibich testified that he agreed with Boyer's suggestion that Jeannette be removed from Longview's internal list of established credit customers, and such removal took place. Further, while Longview attempted at trial to create an impression that it had engaged in a comprehensive investigation of the interleaving paper market prior to its discussions with Jeannette, and that Longview secured Allegheny Ludlum as a customer independently of Jeannette, it is undisputed that none of the Longview representatives ever mentioned such investigation, or Allegheny Ludlum as a potential customer, in any of the communications of discussions with Jeannette which took place before Longview obtained an order from Allegheny Ludlum in early December, 1983. Longview did not reasonably document any particular date when it purportedly began any investigation of the interleaving paper market, independent of the contract by Jeannette. After denying several times during his testimony that Jeannette had provided Longview with the identity of Allegheny Ludlum as a customer, during the October, 1983 telephone conversation he had with Berger, and then Neft, Longview Vice-President Stibich ultimately admitted on cross-examination that Allegheny Ludlum's existence as a potential customer was first brought to Longview's attention during that telephone discussion with the Jeannette representatives.

Based upon the evidence presented, the jury rendered a verdict to the Plaintiff in the amount of $244,000.00, as compensatory damages, representing the 5% commission on the sales of interleaving paper by Longview to

Allegheny Ludlum which occurred up to the date of the trial. Further, the jury awarded Jeannette punitive damages against Longview, in the amount of $500,000.00. Defendant Longview filed motions for post-trial relief in the form of judgment n.o.v., and for a new trial. Such motions were denied by the trial court. We shall now discuss, seriatum, the various arguments raised by Longview on the instant appeal.

First, Longview contends that judgment n.o.v. should have been entered in its favor, because of the absence of mutual assent to essential terms of an agreement between the parties. In essence, Longview maintains that there was no meeting of the minds between it and Jeannette concerning a brokerage agreement between them. In support of that position, Longview points out that several details of such an arrangement were not negotiated or agreed upon, including the price which Jeannette would pay for the paper, the amount of discount or commission Jeannette would receive, the circumstances under which such rates or amounts could be changed, when and how Jeannette could make payment, possession and warehousing of the paper, and other details.

Under common-law contract principles, an agreement may not be held to fail for vagueness if the parties intended to form a contract and there is a reasonably certain basis for giving an appropriate remedy. *Greene v. Oliver Realty, Inc.*, 363 Pa. Super. 534, 526 A.2d 1192 (1987).[1] We find that under the evidence presented in the

[1] As discussed *infra* in this Opinion, the contract in issue in this case is not governed by the Uniform Commercial Code, as it involves an agreement for a brokerage arrangement, and not an agreement for the sale of goods *per se*. However, even assuming that the Code applied in this case, the same rule would apply. See 13 Pa. C.S. §2204(c), which provides, in pertinent part: "Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."

instant case, and reasonable inferences to be drawn therefrom, the jury had justification for concluding that Jeannette and Longview discussed and agreed to all of the essential terms of a brokerage relationship, during the October, 1983 telephone conversation between Stibich and Berger, and then Stibich and Neft. Further, the jury had ample evidence to find that Longview through Stibich, expressly agreed to utilize Jeannette as its broker for purposes of marketing interleaving paper to Allegheny Ludlum and to other customers in the industry. It was understood that Jeannette's commission on such sales would be 5%, which was the standard in the industry. The correspondence between the parties prior to that conversation, the disclosure to Stibich of Jeannette's most important customer for the product, and the delivery of samples and specifications to Longview by Jeannette contributed further support for the conclusion that the parties had agreed on a brokerage arrangement during the telephone conversation. Longview's subsequent establishment of Jeannette as a credit customer on its books, and unsuccessful later attempts to erase the evidence of such conduct only add further weight to the determination that an agreement was reached between the parties for a brokerage arrangement. The lack of a writing is not meaningful with regard to the question of whether or not there was an enforceable agreement, in view of the evidence that Jeannette's brokerage arrangements, during thirty years in that industry, were never in writing.

The lack of some details did not operate to preclude a finding that a contractual relationship existed between the parties. Our courts are constantly confronted with disputes between parties to a contract who have failed to provide in detail for every aspect of the relationship

between them. The lack of detail in such circumstances does not prevent one from determining that there is still a binding agreement between them. In the instant case, we conclude that the jury had sufficient evidence of a contract, and that vagueness as to some terms was not so overwhelming that it voided the basic understanding which was found to exist between the parties. Accordingly, we reject the contention by Longview that indefiniteness of the agreement between it and Jeannette precluded any relief to Jeannette in this case.

Next, Longview asserts that the judgment of the trial court should be reversed, and judgment n.o.v. should have been entered in its favor, because the alleged contract was unenforceable due to an absence of consideration. More specifically, the Appellant maintains that Jeannette made no promises and suffered no bargain-for detriment, which would have furnished consideration for the alleged contract. In support of its position, Longview refers to the case of *Utility Appliances Corp. v. Kuhns*, 393 Pa. 414, 143 A.2d 35 (1958).

In the *Utility Appliances* case, a distributor maintained that a manufacturer had breached an oral contract for the exclusive sale and distribution of the manufacturer's products. The Supreme Court held that judgment n.o.v. should have been granted in favor of the manufacturer because of the absence of any consideration furnished by the distributor. In reaching this conclusion, the Court pointed out, *inter alia*, that the distributor did not promise to invest time, money or effort to promote the sale of the manufacturer's product, and that the distributor was under no duty to purchase any of the manufacturer's product.

The decision in the *Utility Appliance* case does not provide support for the position of Longview in this case, for the record reveals that Jeannette offered various promises, unlike the distributor involved in the *Utility Appliance* case. Jeannette assured Longview that Jeannette would be able to supply its expertise to identify potential purchasers of the interleaving paper which it had proposed that Longview would supply. Such expertise had been developed through Jeannette's long experience and contacts it had made in the industry. It offered to share its valuable knowledge concerning the particular needs of such customers, and introduce Longview's paper to them. Further, Jeannette promised to entertain such customers at its own expense, and to service the accounts by handling customer problems or complaints, without the necessity of any involvement by Longview or its employees. Such entertainment and servicing would have involved costs for Jeannette, and produced savings for Longview. Most importantly, Jeannette offered to guarantee payment on all orders, so as to eliminate any risk to Longview arising from a lack of payments or a delay in payments by any customers. In view of such assurances, we reject the argument by Longview that there was a lack of evidence of promises from the Plaintiff which would comprise consideration in the asserted brokerage agreement between the parties.

The Appellant further contends that the trial court should have granted it judgment n.o.v. because the asserted contract was unenforceable under the Statute of Frauds. The Statute of Frauds cited by Longview appears in Article Two of the Uniform Commercial Code and provides that a contract for the sale of goods for the price of $500.00 or more is not enforceable unless there is some writing sufficient to indicate that a contract has been made between the parties. See 13 Pa. C.S.A.

§2201(a). However, it is clear that Article Two of the Code applies to transactions involving the sale of goods from one party to another, rather than to agreements for services. See 13 Pa.C.S.A. §2102.

The understanding which the jury could have justifiably found to exist between Longview and Jeannette was for the former to employ the services of the latter as a broker. It was not an agreement calling for the sale of any particular amount of paper or other goods from the manufacturer to Jeannette. Rather, it was an understanding that Jeannette would provide services to the manufacturer in return for a 5% commission on any goods sold through such a brokerage arrangement. The Statute of Frauds does not require that such an agreement be in writing to be enforceable. Therefore, we must reject the claim that the trial court erred in refusing to grant judgment n.o.v. to Longview based upon the lack of a written agreement between the parties.

Longview next argues that judgment *non obstante veredicto* should have been entered in its favor by the trial court as to Jeannette's claim of intentional interference with prospective contractual relations. The Appellant argues that Jeannette failed to prove any of the elements of that tort.

In the case of *Thompson Coal Company v. Pike Coal Company*, 488 Pa. 198, 208, 412 A.2d 466, 471 (1979), relying upon its earlier discussion of the issue in *Glenn v. Point Park College*, 441 Pa. 474, 479-80, 272 A.2d 895, 898 (1971), the Supreme Court set forth the following four elements which must appear in order to establish a cause of action for intentional interference with prospective contractual relations:

(1) a prospective contractual relation;

(2) the purpose or intent to harm the plaintiff by preventing the relation from occurring;

(3) the absence of privilege or justification on the part of the defendant; and

(4) the occasioning of actual damage resulting from the defendant's conduct.

We find that all four elements were established in the proof submitted by the Plaintiff in the instant case. First, the Plaintiff submitted sufficient evidence of a prospective contractual relation. That term is difficult to define precisely. In *Thompson Coal Company v. Pike Coal Company, supra* at 208, 412 A.2d at 471, the Supreme Court said, "It is something less than a contractual right, something more than a mere hope." In *Glenn v. Point Park College, supra* at 480-81, 272 A.2d at 898-99, the Court described this element as not a certainty, but more like a reasonable likelihood or probability. In this case, Jeannette was not able to prove with certainty that it would have continued to enjoy a contractual relationship with Allegheny Ludlum. However, it certainly satisfied the burden of showing that there was a reasonable likelihood or probability of such an uninterrupted relationship if it had been able to continue to provide the same type of interleaving paper as it had in the past, without the interference of Longview's direct sales efforts. In that regard, the evidence established that Jeannette had dealt with the specialty steel producer for many years, on behalf of several different manufacturers, selling the same type of interleaving paper. There was no evidence whatsoever to indicate that Allegheny Ludlum would have severed that relationship, had Jeannette begun to offer it the interleaving paper manufactured by Longview, which

Allegheny Ludlum found to be satisfactory for its needs. Thus, the element of a prospective contractual relation was established.

The other elements of the cause of action of intentional interference with a prospective contractual relationship were also present. The Defendant's purpose or intent to harm the Plaintiff, by preventing the relation from occurring, was obvious. By selling directly to Allegheny Ludlum, without Jeannette's involvement as a broker, Longview cost Jeannette, and saved for itself, the 5% brokerage commission which Jeannette would have earned on such sales. There was certainly no privilege or justification on the part of Longview for such financial harm to the Plaintiff. The only intention Longview could have entertained, under these facts, was to eliminate Jeannette as a broker in sales of the southern interleaving paper to Allegheny Ludlum, and to gain the full profits in such business for itself. Finally, the element of actual damage resulting from Longview's conduct was evident. Jeannette was denied a 5% commission on all of the interleaving paper sold by Longview to Allegheny Ludlum.

Consequently, we conclude that there was ample evidence for the jury to properly find that the Defendant tortiously interferred with the Plaintiff's prospective contractual relationship with Allegheny Ludlum. Therefore, there was no error in the trial court's denial of Longview's request for judgment n.o.v. as to that aspect of the Plaintiff's case. An award of damages grounded upon the tortious interference contentions of the Plaintiff was justified.

We next turn to the assertions by Longview that a new trial should have been granted because of alleged errors in the trial court's charge to the jury. In support

of this argument, the Appellant cites 13 different purported areas of error in the charge. These include asserted mistakes in the instructions which were given, as well as in the trial court's failure or refusal to include certain matters in its charge. Within the 13 major areas of alleged error raised by the Appellant are included numerous sub-groups of purported mistakes in the instructions by the trial court. Some portions of the charge challenged by the Appellant cover several pages of transcript. In making this blunderbuss attack on the charge of the trial court, the Appellant has not favored us with citation to any case precedent or other authority as support for its assertions of error.

Any detailed recitation of the Appellant's individual claims of error regarding the instructions to the jury would result in an opinion many times the length of this one. In short, none of the contentions raised by the Appellant concerning the charge of the trial court merit such a detailed analysis. Suffice it to state that we have reviewed the charge in its entirety, and find no justification for a new trial, nor any basic, fundamental, or prejudicial error. See *Segriff v. Johnston*, 402 Pa. 109, 166 A.2d 496 (1960), cert. denied 366 U.S. 941, 81 S.Ct. 1669, 6 L.Ed.2d 851 (1961) on the scope of review in such circumstances. Therefore, we reject the Appellant's argument that the trial court erred in refusing to grant it a new trial because of claimed errors in the jury instructions.

Finally, the Appellant contends that the trial court improperly refused to strike the award of punitive damages against it in this case. In support of that position, it points out that punitive damages are appropriate to punish and deter only extreme behavior, and, even in the rare instances in which they are

justified, are subject to strict control by the court. In support of this position, it cites *Martin v. Johns-Manville Corp.*, 508 Pa. 154, 494 A.2d 1088 (1985), in which that view was expressed by Justice Hutchinson, with one other Justice concurring and four Justices concurring in the result. Further, citing *Feld v. Merriam*, 506 Pa. 383, 485 A.2d 742 (1984) and *Chambers v. Montgomery*, 411 Pa. 339, 192 A.2d 355 (1963), Longview pointed out that punitive damages should be imposed only when the conduct of the defendant is malicious, wanton, reckless, willful or oppressive.[2]

In our opinion, the record in this case adequately established malicious, willful and egregious conduct by Longview that comprised both a breach of contract and an intentional interference with prospective contractual relationships between Jeannette and Allegheny Ludlum. Not only did the evidence show that Longview had breached its agreement to allow Jeannette to act as its broker, but it also made it evident that it used the information and samples Jeannette supplied to it, in furtherance of that contractual relationship, to steal Jeannette's principal customer. It did so with the knowledge that such actions would have a severe adverse financial impact upon Jeannette, while operating to its own pecuniary benefit. It thereafter sought to hide its dishonesty and lack of reasonable business ethics in the transaction by efforts to eliminate evidence of both its

[2] While the author of this Opinion has had grave reservations about the excessive amounts of punitive damages which have been awarded in other cases, it is important to note that the Appellant's challenge in the instant case is not directed toward the amount of the punitive damage verdict rendered by the jury. Longview only contends that it was inappropriate that any punitive damages be awarded. Accordingly, we do not address the amount of punitive damages determined to be appropriate by the jury in the case, as that issue is not presented for our review.

relationship with the Plaintiff, and its reliance upon the information supplied by Jeannette which led to its direct sales to Allegheny Ludlum. In all of these circumstances, we conclude that a basis for an award of punitive damages was established. The conduct of Longview was undoubtedly malicious, willful, and egregious. Accordingly, we find no merit in Longview's final claim of error.

The Judgment of the trial court is hereby affirmed.

Opinion and Order of Court of Common Pleas of Allegheny County, Pennsylvania Dated September 30, 1987

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

No. GD-84-20975

JEANNETTE PAPER COMPANY,
a Pennsylvania Corporation,

Plaintiff,

vs.

LONGVIEW FIBRE COMPANY,

Defendant.

OPINION AND ORDER OF COURT
DENYING DEFENDANT'S MOTION
FOR POST-TRIAL RELIEF

WEIR, *J.*

Copy of Opinion and Order sent to:

Charles P. Falk, Esquire
Counsel for Plaintiff.

Michael J. Betts, Esquire
Counsel for Defendant.

OPINION

WEIR, *J.*

In this case, a jury made an award to the plaintiff in the amounts of $244,000.00 as compensatory damages and $500,000.00 as punitive damages. The defendant has filed for post-trial relief in the form of judgment n.o.v., or for a new trial.

The plaintiff, Jeannette Paper Company (Jeannette) is a broker of paper and has been in business for many years in Westmoreland County. Its longtime chairman and principal owner is Norman L. Berger who is assisted in sales by Peter P. Neft who is its president. The most important single item in Jeannette's business has been the sale of so-called interleaving paper to the stainless steel industry and its biggest customer has been Allegheny Ludlum Steel, which is dominent in this field. Over the years, Jeannette purchased this paper from various satisfactory producers but in 1983, because of developments which are not directly involved in this case, it became important that Jeannette should find a new source of supply which would provide a more flawless product. It was known to Mr. Berger that the defendant, Longview Fibre Company (Longview) had the capability of producing a desirable product, but that it had not wished to get into the interleaving field in the past. However, he decided to approach them and he wrote to their president, R. P. Wallenberg, whose office is at the location of their plant in Longview, Washington. This letter of October 13, 1983, made it clear that the intent of Jeannette was to act as a broker in selling paper to the stainless steel industry in behalf of Longview. By letter dated October 18, 1983, Longview replied that Jeannette would be contacted by Donald C. Stibich, who is Vice-President of sales for Longview, with his office in San Francisco.

For some reason, Mr. Stibich had difficulty in reaching Jeannette by telephone but managed to do so shortly after October 13, 1983, and had an extended and comprehensive conversation with Mr. Berger. Longview had acquired new equipment in its Washington plant which now made the production of interleaving paper of more interest to them than it had been in the past. Mr. Berger responded to Mr. Stibich's inquiry in respect to the role that Jeannette would play as a broker which included taking care of all aspects of customer relations and providing prompt and certain payment to the producer without regard to the action of the customer in this respect. It was also stated that the customary brokerage fee was five per cent (5%).

When Mr. Berger became satisfied that Mr. Stibich had agreed that Jeannette could proceed as broker for Longview in respect to interleave, he revealed that their first customer would be Allegheny Ludlum and he turned over the telephone to Mr. Neft who imparted more detailed information with particular reference to the requirements of Allegheny Ludlum and upon request, sent specifications and samples to Mr. Stibich for the purpose of preparing to serve Allegheny Ludlum.

The next event was the receipt of a letter dated November 22, 1983, to Jeannette from Mr. Stibich in which he said that his east coast sales representative, Bruce Boyer, would be in communication with Jeannette. This did not happen and it could be inferred that Longview was avoiding contact with Jeannette at this time and before Jeannette could accomplish such contact, it learned that Mr. Boyer, as of December, 1983, had already begun to sell interleaving paper directly to Allegheny Ludlum.

The evidence in this case, of which the foregoing statement is merely a synopsis strongly supports the conclusion of the jury that Longview breached its contract to employ Jeannette as a broker and also tortiously interfered with Jeannette's contractual relations with Allegheny Ludlum. This is not to say necessarily that Mr. Stibich instituted his first phone call to take wrongful advantage of a competitor in the field of paper sales but rather as is more probable, that after agreeing to a contract with Mr. Berger, he had second thoughts about sharing any of his company's profit with a broker. But whatever happened, certain things are clear. It is clear that Longview, which had never produced interleaving paper, did so at this time only because of the intervention of Jeannette. It is clear that Allegheny Ludlum, although known to all as a producer of specialty steel, was not in the plans of Longview as a potential customer until its availability was revealed by Jeannette. It is clear that Jeannette aided Longview only because it had been employed as a broker by Longview. It is clear that Boyer was instructed to go after the business of Allegheny Ludlum in breach of an agreement with Jeannette and armed with information improperly obtained from Jeannette.

With respect to the motion for judgment n.o.v., it is of course settled that we must accept all facts and proper inferences which tend to support the verdict and reject all testimony and inferences to the contrary. *Tonkovic v. State Farm Mutual Insurance Co.*, 337 Pa. Super. 123, 486 A. 2d 512 (1984).

The argument in behalf of the defendant which appears to be primary, is that no contract could have resulted from the conversation between the principals in this case on the telephone because of indefiniteness. As to this, it

is not required that every detail be explicitly mentioned if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy. Furthermore, if we accept the testimony of Mr. Berger rather than that of Mr. Stibich, as we are required to do, it appears that there was a very definite understanding. Stibich agreed to employ Jeannette to market interleave to Allegheny Ludlum and then to Jeannette's other customers. Certainly as to Allegheny Ludlum, it is very definite and anything beyond this is immaterial since the jury returned compensatory damages for the loss of brokerage fees of Allegheny Ludlum alone and cut off damages as of the date of trial. As to the amount of the commission, the notes of Mr. Stibich himself show that five per cent (5%) was discussed. As to the duration of the contract, a brokerage contract is generally regarded as lasting as long as the broker is performing his job adequately but more importantly:

> "[C]ontracts which do not fix a definite time for the duration of the relationship they create are sometimes considered as providing for a reasonable time or some particular period inferred from the nature and circumstances of the undertaking."—*O'Neill v. ARA Services, Inc.*, 457 F Supp. 182.

As was mentioned previously, the jury in this case confined its award of damages to the commissions which the plaintiff lost only to the time of trial, following the most conservative course in this respect. Anything less than this would result in a wrong without a remedy, which the law does not favor.

It is also urged that the evidence in this case is not strong enough to support the finding of the jury of tortious interference by Longview of Jeannette's existing and prospective contractual relations with Allegheny Ludlum. This contention must be rejected.

The evidence favorable to the plaintiff and which the jury accepted permits of two possible conclusions. One of these is that Mr. Stibich, having learned of the interleave business from the letter written by Mr. Berger, instituted the critical telephone conversation with the previously conceived plan of gaining information by deception to use in acquiring business then possessed by Jeannette. The other possibility is that the plan was not conceived until after the contract was effected. The latter possibility would appear to be more likely in view of the fact that Longview took internal action in its Credit Department indicating that it expected to be doing business with Jeannette. In any event, either of these courses would constitute most reprehensible conduct and would come well within the ambit of Restatement (Second) of Torts Sec. 766 which was adopted by the Supreme Court of Pennsylvania in *Adler, Barish, Daniels, Levin and Cristoff v. Epstein*, 482 Pa. 416, 393 A. 2d 1175 (1978) and which reads as follows:

> "One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting from the third person's failure to perform the contract."

Also, the action of Longview was clearly intentional and of such a nature that it would obviously be harmful to Jeannette, which made it intentionally harmful even though, as is argued, its immediate purpose would be to profit financially. That is to say, intent to harm can exist otherwise than as the sole motivation for an act which interferes with a contractual relationship between an individual and a third party.

The only other claim of error which we deem to be of consequence is the contention that punitive damages should not be permitted in this case. It is contended that this is not a case in which there is especially egregious misconduct. Any judgment on this sort of thing is necessarily to a degree subjective but to this Court the actions of this defendant were really outrageous in the context of ethical behaviour in business. As long as we have punitive damages in the law, they certainly apply in this instance.

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

No. GD-84-20975

JEANNETTE PAPER COMPANY,
a Pennsylvania Corporation,

Plaintiff,

vs.

LONGVIEW FIBRE COMPANY,

Defendant.

ORDER

AND NOW, this 30th day of September, 1987, in accordance with the Opinion filed herewith, the motion of the defendant for post-trial relief is hereby denied. Judgment to be entered upon payment of the verdict fee.

BY THE COURT

FREDERIC G. WEIR, *J.*
Frederic G. Weir

EO DIE: Exception noted to defendant and bill sealed.

FREDERIC G. WEIR, *J.*
Frederic G. Weir

Supreme Court, U.S.
FILED
JUL 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2051

IN THE

Supreme Court of the United States

October Term, 1988

LONGVIEW FIBRE COMPANY,

Petitioner,

vs.

JEANNETTE PAPER COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Questions Presented

I. Whether Longview has properly preserved any constitutional challenge to the punitive damages award entered below, where Longview failed to raise any constitutional challenges at trial or on direct appeal to the court whose decision is sought to be reviewed.

II. Whether the instant case is an appropriate one in which to consider Longview's constitutional claims, where Longview failed to raise any challenge as to the standards under which punitive damages were awarded below, and where the award in any event bore a reasonable relationship to Jeannette's actual damages, was substantially less than the earnings realized by Longview as a result of its tortious conduct, and represented a modest sanction in light of Longview's egregious conduct.

TABLE OF CONTENTS.

	Page
Questions Presented	i
Table of Authorities	iv
Statement of the Case	1
Summary of Argument	4
Argument	6
I. Under the Principles Announced by this Court in *Browning-Ferris*, Longview has Failed to Properly Preserve any Constitutional Challenge to the Punitive Damages Awarded Below, by Failing to Assert any Constitutional Claims at Trial or on Direct Appeal to the Superior Court of Pennsylvania	6
II. Based on the Recent Holding of this Court in *Browning-Ferris*, the Excessive Fines Clause has no Application to the Punitive Damages Award Entered Below	11
III. The Award of Punitive Damages Entered in this Case was Properly Assessed and Reasonable in Amount	12
IV. The Award Entered Below was Assessed Pursuant to an Appropriate Standard of Proof	15
Conclusion	16

Page

TABLE OF AUTHORITIES.

Cases:

Bankers Life and Casualty Company v. Crenshaw, 108 S.Ct. 1645 (1988) 7,8,10
Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 57 U.S.L.W. 4985 (U.S. June 27, 1989), affirming 845 F.2d 404 (2d Cir. 1988) 4,8,11,15,16
Certified Laboratories of Texas, Inc. v. Rubinson, 303 F.Supp. 1014 (E.D. Pa. 1969) 14
Consumer Party of Pennsylvania v. Commonwealth of Pennsylvania, 510 Pa. 158, 507 A.2d 323 (1986) 7
Gerace v. Holmes Protection of Philadelphia, 357 Pa. Super. 467, 516 A.2d 354 (1986), alloc. denied, 527 A.2d 541 (1987) 7
Radio Station WOW v. Johnson, 326 U.S. 120 (1945) 10
Richette v. Solomon, 410 Pa. 6, 187 A.2d 910 (1963) 14
Thompson v. Swank, 317 Pa. 158, 176 A. 211 (1934) 14

Constitutional provisions:

United States Constitution:
Amendment VIII 3,4,8,11
Amendment XIV, Section 1 3,4,8

Rules and Regulations:

Sup. Ct. R. 17 4
Pa. R. Civ. P. 227.1(b)(2) 6

IN THE

Supreme Court of the United States

October Term, 1988

No. 88-2051

LONGVIEW FIBRE COMPANY,
Petitioner,

vs.

JEANNETTE PAPER COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

Longview Fibre Company ("Longview") has filed a petition for a writ of certiorari, seeking review of an order entered by the Superior Court of Pennsylvania on September 26, 1988. The order in question affirmed, *inter alia*, an award of punitive damages to Jeannette Paper Company ("Jeannette"), based on common law principles of tortious interference with contractual relations. Specifically, the evidence presented at trial established that in the Fall of 1983, Longview, under the guise of engaging Jeannette as a broker of a specialized grade of paper known as interleaving paper, secured information and samples regarding Jeannette's principal and longstanding

interleaving customer, Allegheny Ludlum Steel Corporation. Thereafter, rather than utilizing Jeannette as a broker, Longview repudiated its agreement with Jeannette, and took advantage of the information and samples received from Jeannette in order to acquire the Allegheny Ludlum account for itself, to Jeannette's exclusion. In so doing, Longview thereby appropriated an existing customer of Jeannette's, under false pretenses, so as to deprive Jeannette not only of the benefit of Jeannette's brokerage agreement with Longview, but also of its existing and future interleaving business with Allegheny Ludlum, which dated back to the 1960's. As a result, Jeannette's interleaving sales to Allegheny Ludlum, which had previously been maintained at a level of approximately $1.5 million per year, were virtually eliminated. (A. 10a; R. 205a-208a, 257a, 261a-265a, 438a, 760a). Correspondingly, Longview, which had never previously marketed interleave to any source, took advantage of its wrongful appropriation of the Allegheny Ludlum account, so as to realize earnings of Five Million ($5,000,000) Dollars as of the date of trial, with earnings of a comparable nature being anticipated in the future. (A. 10a; R. 371a-372a, 759a).

In addition to having taken the foregoing course of action, and realizing the benefits resulting therefrom, Longview pursued this course with full knowledge of the detrimental effects its actions would have on Jeannette. (A. 20a; R. 438a). Moreover, Longview thereafter sought to hide its unethical practices, by attempting to eliminate evidence of its brokerage relationship with Jeannette and the fact that Longview had acted on information supplied by Jeannette in order to effectuate direct sales to Allegheny Ludlum. (A. 20a-21a). This included eliminating reference to Jeannette as a customer of Longview's, after having previously opened a line of credit, since Longview "could smell an awful problem

down the road [with Jeannette]". (R. 433a-434a). It also included otherwise attempting, through deception and misrepresentation, to create the after the fact impression that Longview had pursued and secured the Allegheny Ludlum account independently of Jeannette, when all credible evidence demonstrated otherwise. (A. 10a-11a). As a consequence, the evidence below established not only that Longview had wrongfully appropriated Jeannette's principal interleaving customer, and thereby replaced Jeannette as that customer's sole source of interleave, but that Longview had thereafter pursued a course of action, both with Jeannette and at trial, designed to obfuscate its true actions and intentions, in an outrageous effort to avoid liability for its wrongful acts. (A. 20a-21a).

Based on the foregoing evidence, the jury, finding that Longview had breached its brokerage agreement and tortiously interfered with Jeannette's business relationship with Allegheny Ludlum, awarded Jeannette $244,000.00 in compensatory damages, and $500,000.00 in punitive damages. Longview's post-trial motions were denied, and the judgment of the trial court was thereafter affirmed on direct appeal to the Superior Court of Pennsylvania. Longview's petition for a writ of certiorari seeks review of that Superior Court judgment, and requests that this Court consider whether the aforesaid award of punitive damages as assessed against Longview violates the Eighth and Fourteenth Amendments to the Constitution of the United States. Significantly, at trial, in post-trial motions and on direct appeal to the Superior Court of Pennsylvania, Longview at no time raised any constitutional challenges to the assessment of punitive damages against it, nor in fact did Longview raise any challenge to the amount of the damages awarded or the method by which they were calculated.

Summary of Argument

Because Longview failed to raise any constitutional challenge to the punitive damages award before the state trial court or on direct appeal to the Superior Court of Pennsylvania, this Court lacks certiorari jurisdiction. Alternatively, this Court should decline to grant review on writ of certiorari, since no constitutional challenges were properly pressed or passed upon below, and accordingly no important question of federal law was decided by the Pennsylvania state courts. *See* Sup. Ct. R. 17.

Even had Longview properly preserved any constitutional challenge to the punitive damages award in question, any such challenge would be without merit both under the facts of this case and in view of this Court's recent decision in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 57 U.S.L.W. 4985 (U.S. June 27, 1989), *affirming* 845 F.2d 404 (2d Cir. 1988). *Browning-Ferris* expressly held that the Excessive Fines Clause of the Eighth Amendment has no application to punitive damage awards entered in disputes between private parties. Any due process challenge to the award under the Fourteenth Amendment would likewise be unavailing, since any due process concerns would of necessity be directed to the amount of the award and the standards under which the award was assessed. These matters were never challenged by Longview at trial or on direct appeal on any grounds, constitutional or otherwise, and cannot properly be challenged now. Nor would any such challenge have merit, since the punitive amount awarded bore a reasonable relationship to Jeannette's compensatory damages, was substantially less in amount

than the earnings Longview derived from its tortious conduct, and was the product of standards which were appropriately considered and properly applied by the jury.

In sum, this is simply not a case of an unreasonable, excessive or disproportionately large award. To the contrary, in view of the actual damages sustained by Jeannette, the outrageous nature of Longview's conduct, and the gains realized by Longview as a result of that conduct, the award was wholly reasonable and could justifiably have been much larger. This is particularly true in light of Longview's substantial financial resources, Longview being a Five Hundred Million ($500,000,000) Dollar corporation, and the fact that the punitive effect may well be lost on Longview, which acknowledged at trial that to a company of its size, Five Million ($5,000,000) Dollars is only a small portion of its sales and nothing to be overly concerned about. (R. 371a). Accordingly, any due process arguments, when raised in the context of the instant facts, are without merit, and offer no important reason to warrant the grant of review by this Court.

ARGUMENT

I. Under the Principles Announced by this Court in *Browning-Ferris,* Longview has Failed to Properly Preserve any Constitutional Challenge to the Punitive Damages Awarded Below, by Failing to Assert any Constitutional Claims at Trial or on Direct Appeal to the Superior Court of Pennsylvania.

In its petition for writ of certiorari, Longview requests that this Court review the punitive damages award entered against it on constitutional grounds. In its petition, however, Longview neglects to mention that it never raised any constitutional challenge to the punitive damages award at the Pennsylvania state trial court level, including in Longview's post-trial motions, as required by Pennsylvania practice. Pa.R.Civ.P. 227.1(b)(2). (A. 28a; R. 847a). Nor did Longview raise such a challenge before the Superior Court of Pennsylvania, the very court whose judgment is sought to be reviewed. To the contrary, a review of the record as established before the trial court and the Pennsylvania Superior Court reveals that Longview failed to raise any challenge to the punitive damages award, constitutional or otherwise, other than to allege that Longview's actions were not sufficiently egregious to warrant the imposition of punitive damages under common law tort standards. (A. 20a-21a; R. 847a). Based on a review of the evidence presented, however, this argument was soundly rejected by the trial court (A. 28a) and by the Superior Court. (A. 19a-A. 21a).

Nor did Longview raise any constitutional claims in its Petition for Allowance of Appeal as filed with the Supreme Court of Pennsylvania, pursuant to which Longview requested that the Supreme Court of Pennsylvania assume discretionary jurisdiction over this

matter. Rather, the first time Longview challenged the punitive damages award on constitutional grounds was in an Application for Reconsideration filed with the Pennsylvania Supreme Court, after the Pennsylvania Supreme Court had already denied Longview's Petition for Allowance of Appeal and thereby declined to exercise discretionary jurisdiction.

Under these circumstances, the constitutional issues advanced in Longview's petition fall outside of this Court's certiorari jurisdiction, and warrant prompt denial of the petition. Specifically, the issues advanced in Longview's petition have not been properly "pressed or passed upon below." *Bankers Life and Casualty Company v. Crenshaw,* 108 S.Ct. 1645, 1651 (1988). Nor could such claims have been properly pressed or presented on appeal in the Pennsylvania state court system, once Longview had failed to raise these claims at trial. Specifically, in this regard, Pennsylvania law is clear that "constitutional issues will be [considered] waived when they have not been raised in the lower court and are argued for the first time on appeal." *Gerace v. Holmes Protection of Philadelphia,* 357 Pa. Super. 467, 516 A.2d 354 (1986), *alloc. denied,* 527 A.2d 541 (1987); *Consumer Party of Pennsylvania v. Commonwealth of Pennsylvania,* 510 Pa. 158, 507 A.2d 323 (1986).

In the instant case, a review of Longview's post-trial motions before the trial court, and of the questions presented by Longview before the Superior Court, makes it apparent that Longview has waived any constitutional challenge to the punitive damages award in question. (R. 847a; A. 20a). In particular, the opinion of the Superior Court confirms not only that such issues were not "pressed or passed upon below", but that in fact

Longview failed to even challenge the *amount* of the punitive damage verdict as rendered by the jury below. Specifically, as stated by the Superior Court:

> [I]t is important to note that [Longview's] challenge in the instant case is not directed toward the amount of the punitive damage verdict rendered by the jury.... Accordingly, we do not address the amount of punitive damages determined to be appropriate by the jury in the case, as that issue is not presented for our review. (A. 20a, n.2).

As this Court most recently noted in *Browning-Ferris*, constitutional challenges which are not raised at trial or on direct appeal below, and which therefore do not allow for the development of a record at the trial and appellate court levels, are not properly preserved and will not be considered by this Court. 57 U.S.L.W. at 4990 n.23. Accordingly, Longview's failure to properly raise a constitutional challenge to the punitive damages award below warrants denial of Longview's petition for writ of certiorari.

Similarly, denial of the writ in this case is warranted in accordance with the principles discussed in *Bankers Life and Casualty Co., supra.* Specifically, in *Bankers Life*, this Court held that a failure to properly raise a constitutional challenge to an award of punitive damages under the Excessive Fines Clause of the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment warranted denial of certiorari review, either for lack of jurisdiction, or alternatively, on various policy grounds. 108 S.Ct. at 1651. These policy grounds—comity to the states, the need for a properly developed record on appeal, and the availability of less intrusive methods of resolving the issues—apply in full force in the instant case. In particular, Longview failed to allow for the development of a record below by its

failure to present any constitutional arguments at trial or on direct appeal. Furthermore, by failing to raise any challenge to the size of the award on any grounds, Longview precluded the state courts from addressing or determining the propriety of the award on independent, nonfederal grounds. Having failed to challenge the award as excessive on any grounds below, Longview cannot properly challenge the amount awarded on constitutional grounds herein, and its petition must be denied.

Finally, Jeannette would note that any effort by Longview to attempt to preserve a right to pursue a constitutional challenge, based on its Application for Reconsideration filed with the Supreme Court of Pennsylvania, would of necessity be unavailing. First, no constitutional issue was pressed or passed upon below before the Superior Court of Pennsylvania, the court whose judgment is being sought to be reviewed. Furthermore, the issue was not pressed or passed upon below by the Supreme Court of Pennsylvania, since it was not raised in Longview's initial Petition for Allowance of Appeal, and because the Supreme Court of Pennsylvania in any event declined to exercise discretionary jurisdiction over the matter. Nor would the Pennsylvania Supreme Court have had a basis to consider a constitutional challenge, since any constitutional challenge would have been waived by Longview's failure to raise it at trial or on direct appeal.

Moreover, this is not a case in which, although a constitutional or other federal claim may not have been presented at the trial court level, it was presented on direct appeal and accordingly acted upon either by the appellate tribunal on direct appeal or by the trial court.

Rather, the only tribunals exercising jurisdiction in this case, being the trial court and the Superior Court of Pennsylvania, were never presented with a constitutional claim and therefore were never called on to address any constitutional issue whatsoever. Furthermore, since the Supreme Court of Pennsylvania was not required to exercise jurisdiction over the matter, and declined to do so, without opinion, not only did the Pennsylvania Supreme Court not exert jurisdiction, but there is no opinion for constitutional review purposes, and any constitutional challenge has thereby come too late for consideration here. *See Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *Bankers Life, supra.*

For each of the foregoing reasons, Longview has failed to properly preserve a constitutional challenge to the punitive damages award, and Longview's petition for writ of certiorari must be denied.

II. Based on the Recent Holding of this Court in *Browning-Ferris,* the Excessive Fines Clause has no Application to the Punitive Damages Award Entered Below.

Even assuming that Longview's constitutional challenges to the punitive damages award entered in this case had been preserved, these challenges as applied to the facts of this case fail to present any important questions of federal law and are in fact wholly without merit. In this connection, Longview has asserted, *inter alia*, that the punitive damages award in question violates the Excessive Fines Clause of the Eighth Amendment. In support, Longview references the arguments presented to this Court by the petitioner in *Browning-Ferris.* However, subsequent to the filing of Longview's petition, this Court expressly rejected these arguments, holding that the Excessive Fines Clause does not apply to punitive damages awards entered in disputes between private parties. 57 U.S.L.W. at 4990. Similarly, Longview's argument to the effect that the punitive damages award is excessive, and thereby violates fundamental fairness, has not only been waived (A. 20a, n.2), but is likewise without merit in light of the *Browning-Ferris* decision.

III. The Award of Punitive Damages Entered in this Case was Properly Assessed and Reasonable in Amount.

In the instant case, as noted *supra*, Longview never challenged the constitutionality of the punitive damages awarded at trial or on direct appeal, nor did it challenge the amount of the award on any grounds below, constitutional or otherwise. Consequently, having failed to raise any challenge to the size of the award, Longview cannot properly pursue a constitutional challenge to the award herein, or to the standards under which it was awarded. This is particularly true in view of the fact that Longview never challenged the standards under which the jury was charged with respect to an award of punitive damages. In this regard, at trial and on appeal, Longview's sole argument on punitive damages was that its conduct was innocent and therefore not sufficiently egregious to support a punitive damages award. In fact, however, as the jury found and as the Superior Court of Pennsylvania recognized on appeal, the evidence in this case fully supported a punitive damages award and unquestionably evidenced outrageous conduct by Longview. Under these circumstances, any due process challenge regarding the standards under which the jury calculated the amount of the punitive damages has clearly been waived.

Furthermore, even assuming that a constitutional due process challenge to the punitive damages award was preserved, the punitive damages award in the instant case was entirely consistent with due process and represented an appropriate sanction which could in no respect be interpreted either as unduly punitive or unforeseeable by Longview. In this regard, the jury was properly instructed as to the factors to be considered in

determining the proper sanction, including the character of Longview's actions, the nature and extent of the harm suffered by Jeannette, and Longview's financial condition insofar as relevant to punish and deter it from similar conduct in the future. The jury was also instructed that the award not be the result of passion or prejudice, but solely designed to punish and as a deterrent. (R. 626a-627a).

In consideration of these factors, the jury returned an award which not only bore a reasonable relationship to Jeannette's compensatory damages, but which was substantially less than the earnings Longview itself derived as a result of its tortious actions in this case. Specifically, as demonstrated at trial, Longview, as a result of tortiously appropriating Jeannette's principal customer, had realized approximately Five Million ($5,000,000.00) Dollars in earnings as of the date of trial, with continuing earnings of a comparable nature being anticipated in the future. With this in mind, and in further view of Longview's worth, with Longview being described as a Five Hundred Million ($500,000,000.00) Dollar corporation (R. 371a), there can be no question but that Longview, rather than being unduly punished, in the long run substantially benefited from its improprieties. Consequently, the award assessed against Longview was in no respect excessive, outrageous or unduly punitive, and was awarded based on a full consideration of all appropriate factors.

In this connection, for Longview to allege that it did not know that the conduct in which it engaged was prohibited, or that it could be subject to a punitive award if it engaged in outrageous conduct, runs contrary not only to the instructions supplied by Longview to the trial court (R. 820a-821a), which recognized

that Longview could be held liable for outrageous conduct, but is also belied by the fact that punitive sanctions for similar outrageous actions have been assessed on a longstanding basis. *Thompson v. Swank*, 317 Pa. 158, 176 A. 211 (1934); *Richette v. Solomon*, 410 Pa. 6, 187 A.2d 910 (1963); *Certified Laboratories of Texas, Inc. v. Rubinson*, 303 F.Supp. 1014, 1028-1029 (E.D. Pa. 1969). Furthermore, since the award in this case did bear a reasonable relationship to Jeannette's actual damages, the punitive damages were assessed in full accord with Longview's due process rights, and represented a wholly foreseeable and appropriate sanction in view of Longview's actions.

IV. The Award Entered Below was Assessed Pursuant to an Appropriate Standard of Proof.

Lastly, Longview alleges that this Court should review the punitive damages award to determine whether punitive damages may be awarded on a "preponderance of the evidence" standard. Again, this is an argument which Longview failed to raise at trial or on direct appeal, and which is not properly preserved for review. In fact, Longview never even suggested any particular standard of review to be applied in considering an assessment of punitive damages, other than itself supplying instructions calling for a "preponderance of the evidence" standard in assessing certain of Jeannette's claims. Significantly, the trial court's charge itself was in full conformity with Longview's requested instructions in this regard. (R. 608a-609a, 807a-821a).

Moreover, assuming that this challenge had been properly preserved, the instant case, unlike the cases cited by Longview, involves neither a criminal action nor an action by a government against an individual. Rather, this case involves a civil dispute between private parties, as to which the standard of proof applicable to civil actions was therefore properly applied. In this connection, as recognized by this Court in *Browning-Ferris*, punitive damages as assessed here are in the nature of private civil damages awards, and do not constitute fines as imposed in criminal actions. Consequently, Longview's arguments in this regard are likewise without merit.

Conclusion

Applying the principles announced in this Court's recent decision in *Browning-Ferris,* Longview has failed to properly preserve any constitutional challenges to the punitive damages award entered below. Furthermore, Longview has failed to raise any constitutional claims of substantive merit under the facts of this case. For these reasons, and because the *Browning-Ferris* decision as announced subsequent to the filing of Longview's petition renders Longview's arguments meritless, Longview's Petition for Certiorari should be denied.

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No. 88-2051

IN THE

Supreme Court of the United States

October Term, 1988

LONGVIEW FIBRE COMPANY,

Petitioner,

vs.

JEANNETTE PAPER COMPANY,

Respondent.

REPLY BRIEF OF PETITIONER

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13pp

TABLE OF CONTENTS.

	Page
Argument	3
I. Petitioner Properly Preserved its Constitutional Challenges to the Punitive Damages Award	3
Conclusion	6
Addendum: Application for Reconsideration of Denial of Allowance of Appeal	1a

TABLE OF AUTHORITIES.

CASES.

Bankers Life & Casualty Co. v. Crenshaw, 108 S.Ct. 1645 (1988) 1,2,3,5

Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 57 U.S.L.W. 4985 (June 26, 1989) 1,2,3,4

Hathorn v. Lavorn, 457 U.S. 255 (1982) 3

IN THE

Supreme Court of the United States

October Term, 1988

No. 88-2051

LONGVIEW FIBRE COMPANY,
Petitioner,

vs.

JEANNETTE PAPER COMPANY,
Respondent.

REPLY BRIEF OF PETITIONER

This Court held in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 57 U.S.L.W. 4985 (June 26, 1989), that the Excessive Fines Clause of the Eighth Amendment does not apply to awards of punitive damages in private actions. In a concurring opinion joined by Justice Marshall, Justice Brennan emphasized that *Browning-Ferris* "leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties." 57 U.S.L.W. at 4991. *See also Bankers Life & Casualty Co. v. Crenshaw*, 108 S.Ct. 1645, 1656 (1988),

where Justice O'Connor, joined by Justice Scalia, observed that a grant of standardless discretion on the part of the jury to award punitive damages "appears inconsistent with due process." In the present case, as in *Browning-Ferris* and *Bankers Life*, punitive damages were imposed by a jury that, in violation of due process, was possessed of limitless discretion and was provided no meaningful standards by which to determine whether to award punitive damages and, if so, the appropriate amount thereof.

The reasons that warrant this Court's grant of certiorari are set forth in Longview's Petition for Writ of Certiorari. In this Reply Brief, Petitioner addresses the contention of Respondent that Petitioner has failed to preserve its constitutional challenges to the punitive damages award.

I. Petitioner Properly Preserved its Constitutional Challenges to the Punitive Damages Award.

Respondent's contention that Petitioner failed to preserve its constitutional challenges to the award of punitive damages does not withstand scrutiny. Under the standards set forth by this Court in *Browning-Ferris, Bankers Life* and *Hathorn v. Lavorn*, 457 U.S. 255 (1982), the constitutional issues were sufficiently presented to the Pennsylvania state courts and were properly preserved for this Court's review.

Despite the repeated assertions in Respondent's Brief that Petitioner failed to raise its constitutional challenges before the Superior Court of Pennsylvania, the Brief filed by Petitioner with the Superior Court expressly argued that the punitive damages award violates the United States Constitution, including the Due Process Clause of the Fourteenth Amendment:

> Longview . . . contends that the award of punitive damages violates its federal constitutional rights under the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment, and its rights under Article 1, Section 13 of the Pennsylvania Constitution, since, *inter alia*, the amount of the award is grossly disproportionate to Jeannette's actual damages, if any, and is vastly greater than any criminal penalties prescribed by the Pennsylvania legislature for conduct such as that allegedly involved in this case. Longview notes that the United States Supreme Court is addressing several of those constitutional challenges in the case of *Bankers Life & Casualty Co. v. Crenshaw*, No. 85-1765, which was argued to the Court on November 30, 1987. 56 U.S.L.W. 3398.

Jeannette Paper Co. v. Longview Fibre Co., Brief for Appellant, filed with the Superior Court of Pennsylvania on January 4, 1988, at 67 n.45.

Moreover, following this Court's grant of certiorari in *Browning-Ferris,* Petitioner filed an Application for Reconsideration of Denial of Allowance of Appeal with the Supreme Court of Pennsylvania. In that Application, Petitioner set forth the specific ways in which the award of punitive damages violates the United States Constitution, including the assertion that "the standards under which the award of punitive damages were made were vague, indefinite and unclear, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution."[1]

Finally, Petitioner expressly raised each of its constitutional arguments, including the contention that the punitive damages award violates the Due Process Clause, in its Petition for Writ of Certiorari.

Under the standards applied by this court, Petitioner preserved its constitutional challenges to the punitive damages award. In *Browning-Ferris,* review of the punitive damages award on Due Process grounds was denied "[b]ecause petitioners failed to raise their due process argument before either the District Court or the Court of Appeals, and made no specific mention of it in their petition for certiorari in this Court." 57 U.S.L.W. at 4990. In the present case, in contrast to *Browning-Ferris,* Petitioner presented its constitutional arguments to the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania and specifically raised each constitutional violation in the Petition for Writ of Certiorari filed with this Court.

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[1] Petitioner's Application, filed with the Supreme Court of Pennsylvania on March 27, 1989, is appended hereto at 1a-3a.

In *Bankers Life*, this Court declined to address the constitutionality of an award of punitive damages, but observed that the constitutional issues would have been preserved if they had been raised in the petition for rehearing that was filed with the Mississippi Supreme Court:

> Appellant maintains that it raised its various challenges to the size of the punitive damages award in its petition for rehearing before the Mississippi Supreme Court. In urging us to entertain the claims, appellant relies on our decision in *Hathorn v. Lavorn*, 457 U.S. 255, 262-65, 72 L.Ed.2d 824, 102 S.Ct. 2421 (1982), in which we accepted certiorari jurisdiction of claims that were raised, but not passed upon, in the Mississippi Supreme Court on petition for rehearing. *Hathorn* would be apposite were we to conclude that appellant had adequately raised its claims on rehearing. But appellant's petition for rehearing alleged only that the punitive damage award "was clearly excessive, not reasonably related to any legitimate purpose, constitutes excessive fine, and violates constitutional principles." App. to Juris Statement 139a. The vague appeal to constitutional principles does not preserve appellant's Contract Clause or due process claim.

Bankers Life, 108 S.Ct. at 1650. In contrast, Petitioner in the present case specifically raised each of its constitutional challenges in its Application for Reconsideration filed with the Supreme Court of Pennsylvania (as well as in the Brief filed earlier by Petitioner with the Superior Court of Pennsylvania).

Conclusion

Petitioner has preserved its claims that the award of punitive damages violates the United States Constitution, including the Due Process Clause of the Fourteenth Amendment. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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ADDENDUM

Application for Reconsideration of Denial of Allowance of Appeal

In the Supreme Court
of Pennsylvania

No. 572 W.D.
Allocatur Docket 1988

JEANNETTE PAPER COMPANY,
Respondent,

vs.

LONGVIEW FIBRE COMPANY,
Petitioner.

Petitioner, Longview Fibre Company, by its undersigned attorneys, hereby applies for reconsideration of the denial of its Petition for Allowance of Appeal, pursuant to Rule 1123 of the Pennsylvania Rules of Appellate Procedure. Longview states as follows in support of this Application:

1. This action arises out of a dispute between Jeannette Paper Company, a paper broker, and Longview Fibre Company, a paper manufacturer, concerning whether an oral brokerage contract was entered into in 1983.

2. At trial, the jury returned a verdict against Longview on Jeannette's claims for breach of contract and interference with contractual relations and awarded compensatory damages of $244,000 and punitive damages of $500,000 to Jeannette.

3. Longview appealed the trial court's judgment to the Superior Court, which affirmed the judgment by Order and Opinion dated September 26, 1988.

4. On October 26, 1988, Longview filed a Petition for Allowance of Appeal with this Court. Longview's Petition was denied by this Court on March 20, 1989.

5. Subsequent to the filing of Longview's Petition for Allowance of Appeal, the United States Supreme Court granted certiorari in the case of *Browning-Ferris Industries v. Kelco Disposal*, 57 U.S.L.W. 3394 (Dec. 5, 1988), to address the constitutionality of an award of punitive damages in that case. The Supreme Court's decision in *Browning-Ferris* may impact on the constitutionality of the punitive damages award against Longview in the present case.

6. Longview submits that the award of $500,000 of punitive damages against it violates the United States Constitution because:

a. the award of punitive damages is excessive and disproportionate to Longview's conduct, in violation of the Excessive Fines Clause of the Eighth Amendment to the United States Constitution;

b. the standards under which the award of punitive damages were made were vague, indefinite and unclear, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

c. the award of punitive damages was imposed in the absence of the procedural safeguards to which Longview was entitled under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution;

d. the imposition of the award of punitive damages was based on the "preponderance of the evidence" standard, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

e. the award of punitive damages violates the requirement of fundamental fairness contained in the Fourteenth Amendment to the United States Constitution; and

f. the award of punitive damages violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

WHEREFORE, Longview respectfully requests that this Court reconsider its denial of Longview's Petition for Allowance of Appeal and allow an appeal from the decision of the Superior Court. In the alternative, Longview requests that further proceedings in the case be stayed, pending the decision of the United States Supreme Court in *Browning-Ferris*.

Respectfully submitted,

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Certificate of Counsel

Pursuant to Rule 1123(b)(2) of the Pennsylvania Rules of Appellate Procedure, the undersigned counsel hereby certifies that the foregoing Application is presented in good faith and not for delay and that the grounds set forth in the Application arise out of intervening circumstances of substantial or controlling effect.

/s/ MICHAEL J. BETTS
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Supreme Court, U.S.
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No. 88-2051

IN THE

Supreme Court of the United States

October Term, 1988

LONGVIEW FIBRE COMPANY,

Petitioner,

vs.

JEANNETTE PAPER COMPANY,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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12 pp

TABLE OF CONTENTS.

	Page
Argument	1
I. Petitioner Failed To Preserve Any Constitutional Challenge To The Award Entered Below	1
Conclusion	4
Addenda:	
Table of Contents and Statement of the Questions Involved contained in Brief filed by Longview with the Superior Court of Pennsylvania	1a
Table of Contents of Petition for Allowance of Appeal filed by Longview with the Supreme Court of Pennsylvania	5a

TABLE OF AUTHORITIES.

CASES.

Consumer Party of Pennsylvania v. Commonwealth of Pennsylvania, 510 Pa. 158, 507 A.2d 323 (1986) 2

Dilliplaine v. Lehigh Valley Trust Co., 457 Pa. 255, 322 A.2d 114 (1974) 2

Gerace v. Holmes Protection of Philadelphia, 357 Pa. Super. 467, 516 A.2d 354 (1986), *appeal denied*, 527 A.2d 541 (1987) 2

IN THE

Supreme Court of the United States

October Term, 1988

No. 88-2051

LONGVIEW FIBRE COMPANY,
Petitioner,

vs.

JEANNETTE PAPER COMPANY,
Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. Petitioner Failed To Preserve Any Constitutional Challenge To The Award Entered Below

In its Reply Brief to Respondent's Brief in Opposition to Petition for Writ of Certiorari, Petitioner Longview contends that it preserved a constitutional challenge to the punitive damages awarded entered against it. In support, Longview contends that this challenge was preserved before the Superior Court of Pennsylvania, based on a *footnote* contained on page sixty-seven of its seventy page Superior Court brief. Contrary to

Longview's allegations, however, Longview failed to properly raise any constitutional claim. First, Longview failed to raise any constitutional challenge before the trial court, a prerequisite to preserving the issue for review purposes under Pennsylvania law. *See Gerace v. Holmes Protection of Philadelphia*, 357 Pa. Super. 467, 516 A.2d 354 (1986), *appeal denied*, 527 A.2d 541 (1987); *Consumer Party of Pennsylvania v. Commonwealth of Pennsylvania*, 510 Pa. 158, 507 A.2d 323 (1986). *See also Dilliplaine v. Lehigh Valley Trust Co.*, 457 Pa. 255, 322 A.2d 114 (1974). Second, the footnote in question by its terms fails to specifically raise a challenge as to the standards under which the award of punitive damages was assessed, the issue which Longview now seeks to raise. Third, the issues for review by the Superior Court, as framed in Longview's Table of Contents and Statement of the Questions Involved, in no respect raised any constitutional claims whatsoever. To the contrary, the only issue raised by Longview before the Superior Court of Pennsylvania on the subject of punitive damages, as recognized by the Superior Court in its Opinion, was whether Longview's conduct was sufficiently egregious to warrant the imposition of punitive damages (A. 20a). *See also* Table of Contents and Statement of the Questions Involved set forth in Longview's Brief for Appellant, filed with the Superior Court of Pennsylvania on January 24, 1988, appended hereto at 1a-4a.

Since Longview failed to raise any constitutional issues in its Table of Contents or Statement of the Questions Involved, the Superior Court properly directed its Opinion to the issues as framed by Longview. This was particularly appropriate, and in fact required, in view of Longview's failure to have raised any constitutional challenge before the trial court. Nor did Longview

apparently view any such constitutional challenge as being worthy of pursuit, since Longview, in its Petition for Allowance of Appeal filed with the Supreme Court of Pennsylvania, likewise failed to raise any constitutional challenge to the award. *See* Table of Contents of Longview's Petition for Allowance of Appeal, filed with the Supreme Court of Pennsylvania on October 26, 1988, appended hereto at 5a-6a.

Having failed to raise any constitutional challenge to the punitive damages award before the trial court, having failed to properly raise any such challenge in its brief on appeal before the Superior Court of Pennsylvania, and having failed to raise any such challenge in its Petition for Allowance of Appeal, Longview's belated attempt to preserve the issue herein is without merit. To the contrary, as previously noted by Jeannette, no constitutional issues were properly pressed or passed upon below, Longview's failure to properly raise such claims prevented the development of a record for review purposes, and Longview's Petition for Writ of Certiorari should accordingly be denied.

Conclusion

Petitioner has failed to preserve any constitutional challenges to the punitive damages award entered below. Additionally, Longview has failed to raise any constitutional claims of substantive merit, for the reasons set forth in Respondent's initial Brief in Opposition to Petition for Writ of Certiorari. Accordingly, Longview's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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ADDENDUM

IN THE SUPERIOR COURT
OF PENNSYLVANIA

No. 01509 PGH 1987

JEANNETTE PAPER COMPANY,
Appellee,

v.

LONGVIEW FIBRE COMPANY,
Appellant.

BRIEF FOR APPELLANT

Appeal from the Order of September 30, 1987
of the Court of Common Pleas of Allegheny
County, Pennsylvania at No. GD 84-20975

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TABLE OF CONTENTS.

	Page
STATEMENT OF JURISDICTION	1
ORDER IN QUESTION	1
STATEMENT OF THE QUESTIONS INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	28
ARGUMENT	30
I. THE JUDGMENT OF THE TRIAL COURT ON COUNT ONE SHOULD BE REVERSED, AND JUDGMENT SHOULD BE ENTERED IN LONGVIEW'S FAVOR, BECAUSE OF THE ABSENCE OF MUTUAL ASSENT TO THE ESSENTIAL TERMS OF THE ALLEGED ORAL CONTRACT AND THE ABSENCE OF ANY BASIS FOR DETERMINING WHETHER A BREACH OCCURRED OR FOR AWARDING RELIEF	30
II. THE JUDGMENT OF THE TRIAL COURT ON COUNT ONE SHOULD BE REVERSED, AND JUDGMENT SHOULD BE ENTERED IN LONGVIEW'S FAVOR, BECAUSE THE CONTRACT ALLEGED BY JEANNETTE IS UNENFORCEABLE DUE TO THE ABSENCE OF CONSIDERATION	45
III. THE JUDGMENT OF THE TRIAL COURT ON COUNT ONE SHOULD BE REVERSED, AND JUDGMENT SHOULD BE ENTERED IN LONGVIEW'S FAVOR, BECAUSE THE CONTRACT ALLEGED BY JEANNETTE IS UNENFORCEABLE UNDER THE STATUTE OF FRAUDS	47

IV. THE JUDGMENT OF THE TRIAL COURT ON COUNT TWO SHOULD BE REVERSED, AND JUDGMENT SHOULD BE ENTERED IN LONGVIEW'S FAVOR, BECAUSE JEANNETTE FAILED TO ESTABLISH ITS CLAIM FOR INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS 48

V. THE JUDGMENT OF THE TRIAL COURT SHOULD BE REVERSED AND A NEW TRIAL ORDERED BECAUSE OF PREJUDICIAL ERRORS IN THE TRIAL COURT'S CHARGE TO THE JURY 56

VI. THE AWARD OF PUNITIVE DAMAGES SHOULD BE STRICKEN BECAUSE OF THE ABSENCE OF MALICIOUS, WANTON OR ESPECIALLY EGREGIOUS CONDUCT ON THE PART OF LONGVIEW AND BECAUSE JEANNETTE DID NOT SUFFER ANY COMPENSATORY DAMAGES AS A RESULT OF LONGVIEW'S CONDUCT 66

CONCLUSION 70

Statement of the Questions Involved

1. Where an alleged oral brokerage contract lacks many important terms which have not been discussed by the parties in their single telephone conversation, and the broker alleging the existence of the oral contract has not made any promises or suffered any detriment, is the alleged oral contract unenforceable because of indefiniteness, the absence of mutual assent, the absence of consideration, and the Uniform Commercial Code Statute of Frauds? [answered in the negative by the trial court]

2. Where a broker has represented a manufacturer in connection with past sales to a customer, but has no contract with the customer concerning future sales, and the customer ceases its purchases of the product through the broker because of the product's unacceptable quality, may the broker recover against the customer's new supplier under a theory of intentional interference with contractual relations? [answered in the affirmative by the trial court]

3. Is an award of punitive damages appropriate where there is no evidence of any tortious conduct on the part of the defendant, much less any conduct that was malicious, wanton or especially egregious, and where the plaintiff has suffered no compensatory damages as a result of the defendant's conduct? [answered in the affirmative by the trial court]

IN THE SUPREME COURT
OF PENNSYLVANIA

No. _____

JEANNETTE PAPER COMPANY,
Respondent,

v.

LONGVIEW FIBRE COMPANY,
Petitioner.

PETITION FOR ALLOWANCE OF APPEAL

Petition for Allowance of Appeal from the Order of September 26, 1988 of the Superior Court of Pennsylvania at No. 1509 Pittsburgh 1987, affirming the Judgment of October 7, 1987 of the Court of Common Pleas of Allegheny County at No. GD 84-20975

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
QUESTIONS PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	2
1. Procedural History	2
2. Statement of Facts	4
STATEMENT OF REASONS RELIED UPON FOR ALLOWANCE OF APPEAL	9
1. The Superior Court's Decision Is Contrary To Decisions Of This Court Because It Permits Recovery For Tortious Interference In The Context Of A Contractual Dispute And It Fails To Require Proof Of The Established Elements Of The Tort	10
2. The Superior Court's Affirmance Of The Punitive Damages Award Is Contrary To Decisions Of This Court Because It Permits The Recovery Of Punitive Damages In A Contractual Dispute Where The Defendant Did Not Intend To Harm The Plaintiff	18
3. The Superior Court's Decision Is Contrary To Numerous Decisions Of This Court Requiring Mutual Assent To The Material And Necessary Details Of The Bargain In Order For There To Be An Enforceable Contract	23
4. The Superior Court's Decision Is Contrary To Precedent Of This Court Holding In A Factual Indistinguishable Situation That There Was An Absence Of Consideration	26
CONCLUSION	28